FILE COPY

FILED
FEB 14 1972
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1031

LEONARD TONASKET,
Appellant,

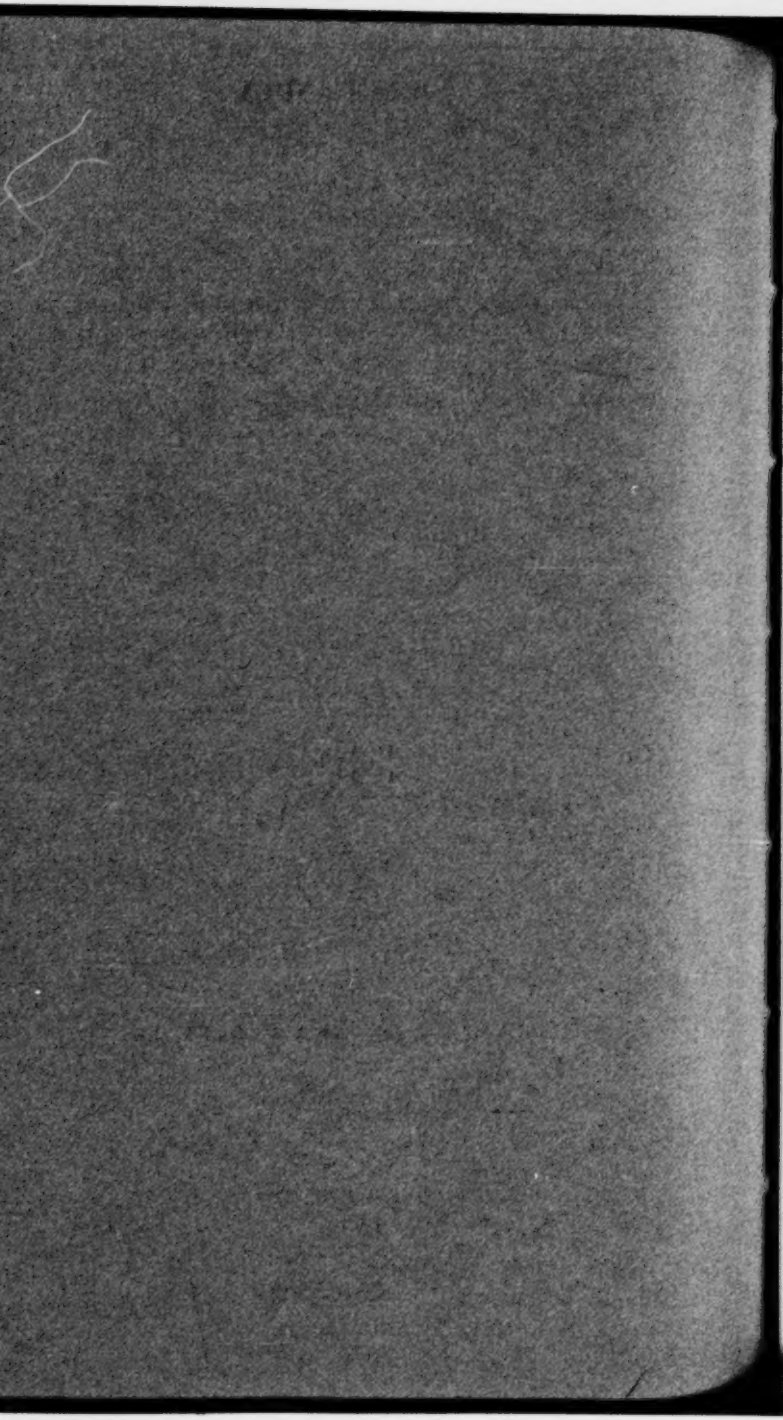
v.

THE STATE OF WASHINGTON and
THE SUPERVISOR OF THE TAX COMMISSION
OF THE STATE OF WASHINGTON,
Respondents.

AMICI CURIAE BRIEF OF CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, WASHINGTON; SUQUAMISH TRIBE OF THE PORT MADISON RESERVATION, WASHINGTON; MUCKLESHOOT INDIAN TRIBE OF THE MUCKLESHOOT INDIAN RESERVATION, WASHINGTON; SKOKOMISH INDIAN TRIBE OF THE SKOKOMISH INDIAN RESERVATION, WASHINGTON; CONFEDERATED TRIBES OF THE CHEHALIS RESERVATION, WASHINGTON; NISQUALLY INDIAN COMMUNITY OF THE NISQUALLY INDIAN RESERVATION, WASHINGTON; AND SQUAXIN ISLAND TRIBE OF THE SQUAXIN ISLAND INDIAN RESERVATION, WASHINGTON

INDIAN *Amici Curiae*,
c/o Colville Indian Agency
Nespelem, Washington 99155
(509) 634-4591

CHAPTERAN & BAY PRESS — SEATTLE, WASHINGTON



SUBJECT INDEX

	Page
terest of *Amici Curiae*	1
uestions Presented	3
gument	3
I. Imposition of State Taxing Authority on Indians Infringes on the Federal Trust Responsibility to Indian Property	3
II. Extension of State Excise Taxes to Indians and Their Property Contravenes Public Law 83-280	5
III. State Taxation of Indian Property and Transactions on Indian Reservations Is Barred Because of Federal Pre-Emption	6
IV. If Public Law 83-280 Is Construed to Authorize State Regulation of Indian Commerce, Then the Act Must Be Found Unconstitutional Under the United States Constitution	8
V. Imposition of State Taxes on Indian Property and Transactions on Indian Reservations Constitutes an Illegal Interference With Tribal Sovereignty	9
VI. Imposition of State Tax Law Is a Violation of the Basic Treaty Undertaking Between the United States and the Tribes	10
nclusion	11

TABLES OF AUTHORITY

Table of Cases

ster v. Wright, 135 Fed. 947 (1905)	9
n Crow v. Oglala Sioux Tribe of Pine Ridge Reservation, 231 F.2d 89, 96	9
ople ex rel. Ray v. Martin, 294 N.Y. 61, 60 N.E.2d 541 (1945), *Aff'd* 326 U.S. 496 (1946)	6

Page

Squire v. Capoeman, 351 U.S. 1 (1956) 4, 5

Stevens v. Commissioner of Internal Revenue, —F.2d— (November 26, 1971) 4

U.S. v. Rickert, 188 U.S. 432 (1903) 5, 8

Warren Trading Post v. Arizona State Tax Commission, 380 U.S. 685 (1965) 7, 8

Worcester v. Georgia, 6 Peter (U.S.) 515, 558-61 9

Constitutional Provisions

United States Constitution:
Article I, Sec. 8, Clause 3 ..... 6, 8
Article VI 10

Statutes

Public Law 83-280 ..... 2, 3, 5, 6, *et seq.*
RCW Chap. 82.08 ..... 2, 3
RCW 82.04 3
RCW 82.24 3
RCW 82.26 3
RCW 82.36 3
RCW 82.32.290 3
RCW 82.32.210 3
RCW 82.32.240 3
25 USC §2 6-7
25 USC §261 7
25 USC §372 4
25 USC §373 4
25 USC §373(a) 4
25 USC §373(b) 4

Page

25 USC §374 4

25 USC §377 4

Treaty of Point Elliot, January 22, 1855, 12 Stat. 927 10

Article I. 10

Article II. 10

Article IX. 10

Federal Regulations

25 CFR Part 15 4

25 CFR §15.25 4

25 CFR §15.25(c) 4

Textbooks

59 Cal. L.Rev. 1261 6

IN THE

Supreme Court of the United States

October Term, 1971

No. .....

LEONARD TONASKET,
Appellant,

v.

THE STATE OF WASHINGTON and
THE SUPERVISOR OF THE TAX COMMISSION
OF THE STATE OF WASHINGTON,
Respondents.

AMICI CURIAE BRIEF OF CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, WASHINGTON; SUQUAMISH TRIBE OF THE PORT MADISON RESERVATION, WASHINGTON; MUCKLESHOOT INDIAN TRIBE OF THE MUCKLESHOOT INDIAN RESERVATION, WASHINGTON; SKOKOMISH INDIAN TRIBE OF THE SKOKOMISH INDIAN RESERVATION, WASHINGTON; CONFEDERATED TRIBES OF THE CHEHALIS RESERVATION, WASHINGTON; NISQUALLY INDIAN COMMUNITY OF THE NISQUALLY INDIAN RESERVATION, WASHINGTON; AND SQUAXIN ISLAND TRIBE OF THE SQUAXIN ISLAND INDIAN RESERVATION, WASHINGTON

The following named Indian tribes join in this *amicus curiae* brief in support of the appeal to the United States Supreme Court in this case.

INTEREST OF *AMICI CURIAE*

All of the *amici* are recognized Indian tribes whose reservation lands are located within the State of Washington. All of the tribes are subject to state civil and crim-

inal jurisdiction by reason of Public Law 83-280. There are other Indian tribes in the state which are subject to partial state jurisdiction, whose interests may not be directly affected. But for those tribes which accepted state jurisdiction, and that includes all of the *amici*, the ruling of the Washington State Supreme Court in this case presents a most serious invasion of their rights as Indian tribes under the treaties and laws of the United States.

In particular, *amici* are concerned that if the state court decision here is allowed to stand, they will find that all of their property which is not actually held in trust by the United States Government will now be made the object of state taxation. Certainly, the state authorities will seek to collect retail sales taxes on sales made to or by Indians on their own reservation lands. This will strike a cruel blow at Indian tribes, because poverty is endemic on Washington State Indian reservations as elsewhere, and the Washington state sales tax which applies to food, medicine and clothing hits poor people hardest. (The sales tax is contained in the Revised Code of Washington, Chapter 82.08.)

In addition, all of the other excise taxes will fall on Indian businessmen and consumers alike, directly affecting the economy of the tribes and their ability to regulate and assist in the economic development on their own reservations, and impairing the efforts of both the tribes and the federal government to change for the better the material life of Indian people.

QUESTIONS PRESENTED

The ultimate question presented in this case may be stated as follows: Where an Indian tribe in the State of Washington is subject to maximum state jurisdiction under Public Law 83-280, may the State tax all Indian personal property and transactions on Indian reservation lands except those items of property held in actual federal trusteeship?

ARGUMENT

I.

Imposition of State Taxing Authority on Indians Infringes on the Federal Trust Responsibility to Indian Property

State excise taxes extend over the entire range of Indian commerce. They include all retail sales (RCW 82.08), the conduct of all forms of business and manufacture (RCW 82.04), additional sales taxes on such specific property as cigarettes (RCW 82.24), other tobacco products (RCW 82.26), and motor vehicle fuel (RCW 82.36), and cover numerous other subject areas. These taxes are enforced under state law by criminal penalties (RCW 82.32.290) and by civil remedies. RCW 82.32.210 gives the State power to:

> "... levy upon and sell the real and/or personal property of the taxpayer found within his county or so much thereof as may be necessary, for the payment of the amount of such warrant ..."

In addition, state law also gives the State the right to impose a lien upon the probate of a deceased taxpayer for taxes upon the filing of a claim. This is stated in RCW 82.32.240, which provides that such lien shall be:

> "... upon all real and personal property of the taxpayer ..."

It is well established that the federal government is precluded from exacting income taxes from Indians derived from trust property because of the likelihood that income taxation could constitute a charge or encumbrance on trust property. *Squire v. Capoeman*, 351 U.S. 1 (1956). See also the recent decision in *Stevens v. Commissioner of Internal Revenue*, ...F.2d ..... (November 26, 1971).

Where the United States is precluded from taxing Indians for income derived from their own trust property because the encumbrance the tax could create upon such property is contrary to the guarantee of the United States to ensure that trust property shall be free of encumbrance, surely the State may not tax Indians for property used on or activities conducted on their trust lands where such power of taxation carries with it the direct threat of encumbrance of trust lands and property.

It must also be noted that the State tax laws give the State lien rights as to probate proceedings, and a serious question would be presented if such a lien claim were made in the estate of an Indian to whom an allotment of land had been made. Such proceedings are governed by 25 U.S.C. §372, §373, §373(a), §373(b), §374, and §377. The Secretary of Interior has promulgated regulations governing the administration of estates of Indians which are found in 25 C.F.R. Part 15. Under 25 C.F.R. 15.25, priority of claims is set forth and provides that claims of general creditors are to be allowed after claims of indebtedness to the tribe and after claims of indebtedness to the United States or any of its agencies. Further, Section 15.25(c) provides that no claims of general creditors shall be allowed if the value of the estate is $1,500 or less and the

decedent is survived by a spouse or by one or more minor children.

Under *Squire v. Capoeman, supra,* and *U.S. v. Rickert,* 188 U.S. 432 (1903), state tax laws cannot be permitted to affect this federally pre-empted area.

II.

Extension of State Excise Taxes to Indians and Their Property Contravenes Public Law 83-280

Public Law 83-280 carefully reserved out of the transfer of jurisdiction to states any subject area which would be construed to authorize:

> "... alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in any manner inconsistent with any federal treaty, agreement or statute, or with any regulation made pursuant thereto; or shall confer jurisdiction upon the state to adjudicate in probate proceedings or otherwise, the ownership or right to possession of any of such property or any interest therein."

As discussed in the preceding section of this brief, state tax laws by their very terms invade the area reserved by Public Law 83-280 to federal jurisdiction. Public Law 83-280 is no warrant to the states to extend taxation over Indian property on their reservations, or Indian business transactions on Indian reservations where the effect could be to create an encumbrance upon Indian trust property. Obviously, state tax authority could not be sustained on the ground that it was based upon non-trust property or transactions, where collection measures would necessarily involve liens or encumbrances on trust property.

An examination of the history of Public Law 83-280 should make it clear that Congress had no intention of dismantling the entire structure of Indian tax immunity in the enactment of Public Law 83-280. Certainly, the tribes which asked for state jurisdiction had no such understanding of the effects of this law. If such effect is to be given to it, it should be based only upon the clearest expressions of statutory authority by the Congress. In fact, the Congress has expressed its intention contrarily in excepting from the operation of the Act anything which could create encumbrances or taxation on Indian property. See 59 Cal. L. Rev. 1261.

III.

State Taxation of Indian Property and Transactions on Indian Reservations is Barred Because of Federal Pre-Emption

Nothing could be more clear than the federal preemption of the field of Indian commerce. The authority to regulate Indian commerce is placed in the Congress by Article I, section 8, clause 3 of the United States Constitution:

> "Congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes . . ."

This power has been described as "paramount and of a most sweeping character." *People ex rel. Ray v. Martin*, 294 N.Y. 61; 60 N.E.2d 541 (1945), *aff'd* 326 U.S. 496 (1946).

Congress has exercised its authority to regulate such commerce. 25 U.S.C. §2 provides:

> "The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agree-

> ably to such regulations as the President may prescribe, have the management of *all* Indian affairs and of *all matters* arising out of Indian relations."

The Secretary has in fact undertaken broad management and control of Indian affairs. See 25 C.F.R. Congress has further specifically acted in the area of Indian commerce in enacting 25 U.S.C. §261 *et seq.*, the Federal Traders Act. This Act authorizes full blood Indians to conduct businesses on reservations without federal license, but reserves to the Commissioner of Indian Affairs exclusive authority to license all other persons to conduct such business and:

> "to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians."

The U. S. Supreme Court has ruled that this constitutes federal preemption of Indian commerce in *Warren Trading Post v. Arizona State Tax Commission*, 380 U.S. 685 (1965). The basic policy which the U.S. Supreme Court was concerned to protect was the placement of financial burdens upon the businessmen doing business on the reservation, or upon the Indians with whom he deals.

The federal interest in Indian affairs has, if anything, grown far more pervasive since the decision of this court in the *Warren* case in 1965. The court may take judicial notice of the many programs and policies promulgated by the Congress and agencies of the federal government to improve the material conditions of life on Indian reservations in the United States. Extension of state tax authority over all Indian property and transactions runs directly counter to the federal interest in this area. It would im-

pose new burdens on Indians attempting to engage in businesses and would penalize those Indians who avail themselves of tribal or federal loan programs to start businesses upon their reservations.

It is well-established both by *Warren Trading Post v. Arizona Tax Commission, supra,* and by *U. S. v. Rickert, supra,* that a state tax will not be permitted to invade an area which is federally reserved and where the United States has acted to carry out its authority and responsibility in the area.

IV.

If Public Law 83-280 is Construed to Authorize State Regulation of Indian Commerce, then the Act Must Be Found Unconstitutional Under the United States Constitution

Under Article I, section 8, clause 3, exclusive power to regulate Indian commerce is placed in the Congress. It is significant to note that Congressional authority over Indian commerce is contained in the same phrase which gives the Congress authority over foreign commerce and interstate commerce.

It would contravene the express provisions of the commerce clause for a federal statute to be construed as transferring to a state the power reserved to the Congress. No more could this be done constitutionally than transfer to a state of power to regulate any portion of foreign commerce or interstate commerce.

It is elementary that a law must not be construed as contravening constitutional provisions if such a construction can be avoided. Clearly, allowing the decision of the Washington State Supreme Court to stand in this case

would result in leaving the State with power constitutionally reserved to the United States Congress.

V.

Imposition of State Taxes on Indian Property and Transactions on Indian Reservations Constitutes an Illegal Interference with Tribal Sovereignty

The inherent sovereign authority of Indian tribes has been recognized and protected by the courts since the decision of this court in *Worcester v. Georgia*, 6 Peter (U.S.) 515, 558-61, one hundred forty years ago.

Included among these inherent sovereign powers is the tribal power to tax businesses conducted upon the reservation of the tribe. *Iron Crow v. Oglala Sioux Tribe of Pine Ridge Reservation*, 231 F.2d 89, 96; *Buster v. Wright*, 135 Fed. 947 (1905). The imposition of an entire state tax structure on Indian businessmen and Indian consumers on an Indian reservation clearly impairs, if not totally displaces, the tribal taxing authority.

It seems that the state may have a twofold interest in attempting to extend its taxes to such transactions: first, the all-pervading desire to increase state revenues, and second, an effort to prevent Indian businessmen and their customers from obtaining any competitive advantages over non-Indian businesses located in adjacent communities. The ultimate effect of such tax equalization is to protect merchants in adjacent communities from loss of Indian business due to tax advantages.

VI.

Imposition of State Tax Law is a Violation of the Basic Treaty Undertaking Between the United States and the Tribes

Many of the Washington State tribes are parties to treaties negotiated in 1854 and 1855, such as the Treaty of Point Elliot, January 22, 1855, 12 Stat. 927. (Including *amici curiae* Suquamish and Muckleshoot Tribes). The pattern of this treaty is common to the Northwest. Article I of the treaty declares that all of the tribes party thereto ceded to the United States all of their right to their land and their country. Article II of the treaty declared that the tribes reserved lands for their exclusive use. The remaining articles recited the obligations and commitments of the United States to the Indians and Article IX recited:

> "The said tribes and bands acknowledge their dependence on the government of the United States, and promise to be friendly with all citizens thereof . . ."

Therein is found the basic undertaking of the parties: land cession by the Indians, guarantees of security by the United States, and establishment of the dependency of the tribes on the United States on the one hand and the correlative responsibility of the United States to the tribes on the other.

This basic relationship is one between the tribes and the United States and must be construed liberally as the Indians understood it. Subsequent Acts of Congress should not lightly be construed as impairing such obligations. Clearly, under Article VI of the United States Constitution, no state law may be construed as superseding or impairing such obligation.

CONCLUSION

The decision of the Washington State Supreme Court in this case has construed an Act of Congress in such a manner as to raise serious questions as to the validity of a state law with respect to a federal statute, with respect to the United States Constitution and with respect to Indian treaties. The decision also raises a possible question as to the constitutionality of the federal act itself if it is to be given the effect which the State Supreme Court has given it. Therefore, we respectfully urge that the United States Supreme Court note probable jurisdiction in this case.

DATED February 10, 1972.

Respectfully submitted,

CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, WASHINGTON

SUQUAMISH TRIBE OF THE PORT MADISON RESERVATION, WASHINGTON

MUCKLESHOOT INDIAN TRIBE OF THE MUCKLESHOOT INDIAN RESERVATION, WASHINGTON

SKOKOMISH INDIAN TRIBE OF THE SKOKOMISH INDIAN RESERVATION, WASHINGTON

CONFEDERATED TRIBES OF THE CHEHALIS RESERVATION, WASHINGTON

NISQUALLY INDIAN COMMUNITY OF THE NISQUALLY INDIAN RESERVATION, WASHINGTON

SQUAXIN ISLAND TRIBE OF THE SQUAXIN ISLAND INDIAN RESERVATION, WASHINGTON

INDIAN *Amici Curiae*,
c/o Colville Indian Agency
Nespelem, Washington 99155
(509) 634-4591